PUBLIC PROSECUTOR

v.

FRANCIS PHILIP NUNIS

HIGH COURT MALAYA, PENANG
ABDUL HAMID OMAR J
[CRIMINAL APPEAL NO. 32 OF 1979]
17 MARCH 1982

CRIMINAL PROCEDURE: *Public officer charged with corruption - Whether prosecution has to prove - Corrupt intent - That money was received or anything at all - That advantage need not be to accused personally but to third party - Whether there was pecuniary or other advantage - Ultimate recipient third party - Effect - Emergency (Essential Powers) Ord. No. 22/70, s. 2(1).*

This is an appeal by the learned D.P.P. against the acquittal of the respondent by the President, Sessions Court, Penang on an offence punishable under s. 2(1) of the Emergency (Essential Powers) Ord. No. 22/70. The respondent on 12 July 1974 being a public officer namely the Pengarah perkhidmatan Bomba, Lembaga Pengurus Kerajaan Tempatan, Pulau Pinang was alleged to have recommended to the Chairman of Lembaga Pengurus Kerajaan Tempatan (LPKT) to approve the purchase of two oxygen cylinders for RM3,800 from Simon Enterprise, a company belonging to the respondent's brother-in-law. As a result of this recommendation, the said LPKT purchased the said equipment when to the respondent's knowledge, at the material time, the said equipment could have been purchased by the LPKT directly from Far East Oxygen Sdn. Bhd. for RM2,600 and consequently, Simon Enterprise made a profit of RM1,200.

The prosecution had adduced evidence that despite the Sales Executive of Far East Oxygen having personally approached the respondent some time in March 1974 the respondent did not invite this company for quotations when he sent out letters to 14 firms in June 1974, one of them Simon Enterprise. The prosecution also adduced evidence that the resuscitators were bought by Simon Enterprise from Far East Oxygen for RM1,300 each and sent to the respondent's house on 27 July 1974 before they were delivered to the Fire Department on 30 July 74.

Held:

[1] The totality of the evidence clearly shows that the respondent was interested in the business of Simon Enterprise belonging to his brother-in-law. There is overwhelming evidence to sustain a case beyond any reasonable doubt that not only the respondent use his public office in his capacity as such public officer to secure contract for his brother-in-law's company should benefit from the contract.

[2] It is clear from the evidence that the respondent abused his public position when he assisted or gave aid to his brother-in-law. It was beneficial to him personally that by so doing he would provide benefits to close members of his family. An act on the part of showing favour to his brother-in-law to effect financial advantage to him.

[3] Having reviewed the totality of the evidence adduced by the prosecution and the defence, the Court had arrived at a finding that on the facts a verdict of not guilty would be grossly against the weight of evidence.

[Appeal allowed. Order of acquittal set aside and substitute therefor a conviction.]

Cases referred to:
Northam v. Barnet London Borough Council [1978] 1 WLR 220
Public Prosecutor v. Datuk Tan Cheng Swee & Ors. [1979] 1 MLJ 166
Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor [1981] 2 MLJ 243

Legislation referred to:
Emergency (Essential Powers) Ordinance No. 22, 1970, s. 2(1)
Municipal Ordinance (SS Cap. 133), s. 23

Other sources referred to:
Shorter Oxford English Dictionary, 3rd Edn.
Words and Phrases 2nd Edn., Vol. 1

For the appellant - A. Khalid bin Abdul Manaff D.P.P.
For the respondent - K. Balasundaram

JUDGMENT

Abdul Hamid Omar J:

The Public Prosecutor is dissatisfied with the decision of the President Sessions Court Penang who acquitted and discharged the respondent. Francis Philip Nunis, on the following charge:

> That you on 12 July 1974 at the Lembaga Pengurus Kerajaan Tempatan Pulau Pinang at Jalan Padang Kota Lama, in the District of Georgetown, in the State of Pulau Pinang, being a public officer namely the Pengarah Perkhidmatan Bomba, Lembaga Pengurus Kerajaan Tempatan Pulau Pinang. Whilst being such officer committed corrupt practice by using your public office for your advantage, in that you, being actively interested in the business of Simon Enterprise, recommended to the Chairman of the Lembaga Pengurus Kerajaan Tempatan Pulau Pinang on that date, to approve the purchase from Simon Enterprise of two (2) complete sets of N/Ideal Automatic Resuscitator - Model S/50 and two (2) spare cylinders of oxygen at a price of RM3,800 and as a result of which recommendation, the said Lembaga purchased the said equipment when to your knowledge, at the material time, the said equipment could have been purchased by the Lembaga directly from Far East Oxygen Sdn. Bhd. for RM2,600, as a result of which, Simon Enterprise made a profit of RM1,200/- and that you thereby committed an offence punishable under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

The facts briefly are that sometime in March 1974 the respondent, then Penang State Fire Chief, was approached by one Tan Loy Boon (PW3), Sales Executive, Far East Oxygen together with Leong Tong Chow (PW4), a Sales Executive North, Far East Oxygen (erroneously referred to as Yong (PW7) in the President's grounds of judgment) to introduce and demonstrate a new brand of resuscitators. The cost of each set including an oxygen cylinder was RM1,300. Leong was to follow up. He telephoned the respondent who told him that he was considering. A few weeks later Leong called on the respondent who again told him that he was considering.

In June 1974 the respondent sent out letters to 14 firms one of them Simon Enterprise, a company belonging to the respondent's brother-in-law, inviting quotations for the supply of two sets of resuscitators and two oxygen cylinders. The Far East Oxygen was left out. Five firms submitted their quotations. The price quoted by Simon Enterprise was lowest.

In his capacity as Head of Department, the respondent recommended to the Chairman of Lembaga pengurus kerajaan Tempatan (LPKT) that the two sets be purchased for RM3,600 from Simon Enterprise. This is contrary to s. 23 of the Municipal Ordinance which requires that purchases exceeding RM2,000 be made by way of tender. The respondent thus acted in contravention of that section.

Evidence reveals that PW3 was the one who spoke to the respondent during the first visit and PW4 did not pay much attention to what had transpired between them. PW4 did not know whether PW3 mentioned the price. PW3 however quite clearly stated that he told the respondent the price of the resuscitator, and showed the equipment to the respondent in the latter's office. In the grounds of judgment the learned President said that PW4 did not hear that aspect of PW3's conversation with the respondent regarding the price. My view is that if it is the intention of the learned President to convey the impression that PW3 did not mention price he was clearly in error and any such finding would be against the weight of evidence. PW3 approached the respondent with a view to selling the resuscitator and it was therefore inconceivable that he had omitted to disclose the price to the respondent. PW3's evidence on this point was not seriously challenged except for the denial by the respondent. In any event the learned President has not said that he disbelieved PW3. Evidence shows that not only PW4 did not hear this aspect of the conversation but also did not hear any part of the conversation. There is also this other aspect of the evidence that must be borne in mind. The subsequent conduct of the respondent was inconsistent with that of person who was ignorant of the price of the equipment. There is abundance of evidence to justify in inference that he knew. The prosecution adduced evidence to show that the resuscitators were bought by Simon Enterprise from Far East Oxygen for RM1,300 each.

The learned President first of all dealt with the appellant's submission to the effect that the prosecution did not have to prove (a) a corrupt intent; (b) that the respondent received any money or anything at all; and (c) that the advantage need not be to the respondent personally but may be to a third party. He also referred to the defence submission that the prosecution had to prove the respondent was using public office for his advantage and that he was actively interested in the business of Simon Enterprise. He formed the view that *mens rea*, i.e. corrupt intent, must be proved unless it is expressly or by implication excluded by statute. He also formed the view that the prosecution must prove the respondent used his public position with the intention of enriching himself pecuniary or otherwise. Speaking of the word "corrupt" he said -

> Here corrupt is used as an adjective to qualify the term 'practice'. 'Corrupt' is frowned upon but not any other type of practice.

The learned President concluded that "to secure a conviction the prosecution must prove three things: Firstly, that he is a public officer and, secondly, that he used his public office, and thirdly, that he did so for his pecuniary advantage."

He held that the two limbs have been satisfied. In this regard he is right for there is abundance of evidence to show that the respondent did use his public office in his capacity as such public officer to secure for Simon Enterprise a contract to supply two resuscitators to the strength of his recommendation that the Lembaga Pengurus Kerajaan Tempatan gave its approval.

In my view the totality of the evidence clearly shows that the respondent was interested in the business of Simon Enterprise. Originally this company belonged to his father-in-law but later became the sole Proprietorship of his brother-in-law Tham Yew Weng. If, as contended by the defence, he was not so interested, it seems odd that he should have gone completely out of his way to make sure that the resuscitators be supplied by this company. There is this further evidence it was the respondent who arranged that the sets to be purchased by Simon Enterprise from Far East Oxygen. The price paid by Simon Enterprise was the price PW3 said he had conveyed to the respondent. It is also revealed that upon collection from Far East Oxygen the two sets of resuscitators were taken to the respondent's house before

they were delivered to the Fire Department. PW6, a cousin of the respondent, testified to that effect. Effort was made by the defence to discredit PW6 but rather unsuccessfully for there is the testimony of Tan Teong Chai (PW7), gas store keeper Far East Oxygen, who said that he did release two sets to PW6 on 27 July 1974. PW10, a senior clerk, confirmed this. These sets were not sent to the Department until 30 July 1974.

Looking at the evidence as a whole, there clearly emerges a case, as was found by the learned President, that the respondent did use his public office in his capacity as such public officer to effect purchase of the two resuscitators from his brother-in-law's company. The finding is reinforced by the fact that Far East Oxygen was not even invited to submit its quotations.

There also emerges from the evidence that a purchase above a certain sum must be by tender. The respondent denied he was aware of s. 23 of the Municipal Ordinance. Dispensation of a tender could only be sanctioned by the Chairman of L.P.K.T. In this respect the Director General of L.P.K.T. did state that he drew the attention of Heads of Departments at a meeting of the requirement of s. 23 of the Municipal Ordinance. It is in my view highly unlikely that the respondant was unaware of this legal requirement. What seems obvious to me is that if a tender had been invited Far East Oxygen would certainly have tendered and in that event Simon Enterprise would not have had a chance for it had to depend on supply of the two sets from Far East Oxygen.

In my judgment there is overwhelming evidence to sustain a case beyond any reasonable doubt that not only the respondent used his public office in his capacity as such public officer to secure contract for Simon Enterprise should benefit from the contract.

The question that remains for consideration is essentially a question of law whether there was "Pecuniary or other advantage" to the respondent. The learned President in his judgment concluded, after examining s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970, that -

> In the instant case the recipient of the pecuniary advantage is a third party.
>
> The general principle regarding the interpretation of statutes is that the Court ought not to give it a wider or narrower definition than is stated in clear terms in the statute.

He quoted a passage from the judgment of Lord Denning M.R. in *Northam v. Barnet London Borough Council* [1978] WLR 220, which reads -

> Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the Judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done had they had the situation in mind... in all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision'. It is no longer necessary for the Judges to wring their hands and say 'there is nothing we can do about.'

The learned President then went on to say -

> In short it would appear that under certain circumstances the court is required to read words into a statute in order to give effect to the intention of the legislature.
>
> The Court may be accused of being a strict constructionist if it construes the words 'to his pecuniary or other advantage' to mean that the advantage pecuniary or otherwise must accrue to the Accused and not a third party.
>
> On the other hand if the Court were to follow the view of Lord Denning and were required to read in words e.g. to his or any other persons pecuniary or other advantage in order to rope in the third parties what would the effect be?

To my mind a most intolerable and ridiculous state of affairs would prevail.

To hypothesize a Member of Parliament or a State Assemblyman or a public officer for that matter use his public office to do an act and thereby a third party derives an advantage can he be said to have committed an offence under the section?

Perhaps another illustration may make the picture a little bit more intelligible.

All public officers we know are required to use their public office for the benefit of society or third parties.

If therefore A - an engineer used his public office or 'good offices' to build a road in the kampong as a result of which the kampong folk derive an obvious advantage does he commit an offence?

Public officers, Members of Parliament and State Assemblymen by the very nature of their jobs are expected to use their public office to do acts which will invariably result in third parties obtaining advantages.

If the situation were otherwise the wheels of administration would certainly grind to a halt, because in time, there would be no M.P.s, State Assemblymen or public officers left in the country to perform their various functions.

If we adopt the construction of the prosecution all these people could be properly roped in under the section.

This to my mind would defeat and frustrate the intention of the legislature.

I have set out at some length that part of the learned President's judgment to show the flaws and errors in the reasonings in support of his interpretation.

In his judgment it is neither the intention of the legislature to punish such people nor to have such people in mind. In his view it is an abuse of language to say that the word "advantage" also means an advantage to a third party. It is his view that to come within the ambit of s. 2(1) of the Ordinance the "pecuniary or other advantage" there must accrue to the respondent either directly or indirectly in the sense he must be the ultimate recipient of the advantage.

To illustrate his conclusion that for an offence to be committed under s. 2(1) of the Ordinance, pecuniary or other advantage must accrue only to the respondent and not to a third party. Before I deal with the question of pecuniary or other advantage it seems convenient at this point to set out s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 and the definition of "corrupt practice" as follows:

2(1) Any Member of the administration or any Member of parliament or the State Legislative Assembly or any public officer, who while being such a Member or officer commits any corrupt practice shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding twenty thousand dollars or to both such imprisonment and fine.

"Corrupt practice" is defined for purposes of s. 2 to mean "any act done by any Member or officer referred to in subsection (1) in his capacity to such Member or officer, whereby he has used his public position or office for his pecuniary or other advantage;"

Turning now the issue that arises for determination, it is my view that the learned President seriously erred in law when he spoke on *ultimate recipient* (emphasis is mine), in particular, with reference to "other advantage." The question is whether the respondent did as public officer and in such capacity was to his other advantage. What constitutes an advantage within the ambit of s. 2(1) of the Ordinance and as defined by the words "corrupt practice"

would depend on the facts of each particular case. An advantage to a public officer who uses his public position may not necessarily be an advantage to another public officer who similarly uses his public position. The circumstances surrounding must be considered, for instance, the mode and manner in which the public position is so used; the nature of relationship between such public officer and the party in whose favour the public position used; the interest the public officer shows or may have in the matter and the benefit that may be accrued to the public officer pecuniary or otherwise or for money or money's worth. It is difficult, if not impossible, to specify exhaustively the exact circumstances under which the use by a public officer of his public position can be said to be to his advantage.

To my mind it is the clear intention of the legislature that the words "other advantage" should be given a very wide meaning covering the variety of situations depending on the facts of each case. To consider otherwise would not indeed promote or give effect the intention of the legislature and the object underlying the provision.

I now turn to the illustration given by the learned President citing, hypothetically, the case of a member of Parliament, an Assemblyman and an engineer in the public service. In the case of a Member of parliament or an Assemblyman it is common knowledge that he has a certain role to play in the community development. As an elected representative, he assumes a certain responsibility to promote well being, particularly within the constituency he is elected and to secure development whenever possible for his constituency. The intention there is to bring benefit to the people generally but in this respect it is to be borne in mind that a project or an undertaking that is effected is in fact a project or an undertaking by the Federal or State Government as the case may be even though it is initiated by a member of Parliament or an Assemblyman or for that matter an engineer in the public service. It could be said to be an advantage to a Member of Parliament or an Assemblyman in the general sense of the word but that certainly is not the kind of advantage that is intended by the legislature. We are concerned here with an abuse of public position for private or personal pecuniary or other advantage. It cannot of course be ruled out that there can be cases where a Member of Parliament or an Assemblyman abuses his public position for his pecuniary or other advantages in which case he is caught by s. 2(1) of the Ordinance.

To return to the point of law under consideration, I emphasize that the words "other advantage" would have to be construed widely and that other advantage need not necessarily be pecuniary in nature. My view is fortified by a passage in *Public Prosecutor v. Datuk Tan Cheng Swee & Ors.* [1979] 1 MLJ 166 referred to in *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 243 where, speaking of the object of the Ordinance, it is stated as follows:

> We consider that our view accords with sound common sense. The Emergency (Essential Powers) Ordinance No. 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act.

Raja Azlan Shah, C.J. in *Haji Abdul Ghani's* case has also said at p. 246 as follows -

> It is therefore no longer in dispute that the object of the Ordinance is wide so as to bring to book corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage. The use in the Ordinance of the words 'pecuniary or other advantage' is significant. The word 'other' appearing in the context of the definition is not caught by the *ejusdem generis* rule.

As for the other meaning of the word "advantage", it may be useful to examine the meaning given to the expression under the Public Bodies Corrupt Practices Act 1889 as set out in *Words and Phrases* 2nd Edn., Vol. 1 which reads -

> the expression 'advantage' includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.

I am not saying that the word "advantage" under our Ordinance shall have the meanings assigned to it under the English Act but to stress that it is really open to very wide interpretation.

I also refer to the *Shorter Oxford English Dictionary*, 3rd Edn. which sets out the meaning of the word "advantage" to include *inter alia* "a favouring circumstance", "benefit" and "to benefit, profit", "to be beneficial to etc."

There is to my mind no mystery in the word "advantage". The expression is to be construed widely to include a benefit or gain of some kind other than pecuniary. If a public officer abuses his public position to advance a private or personal interest whereby it is accrued to him either a pecuniary gain or benefit or something else may derive direct benefit from it, that advantage is, in my view, the kind of advantage that the legislature has in mind.

I consider what I have stated to be the approach consistent with the object of the legislature, and in the circumstances of this particular case, I feel constrained to say that the learned President has completely missed the point indeed was seriously in error in his interpretation of the meaning to be assigned to the words "other advantage".

It is clear from the evidence that the respondent abused his public position when he assisted or gave aid to his brother-in-law. It was beneficial to him personally that by so doing he could provide benefits to close members of his family. It was undoubtedly a comfort to him to be able to effect financial gain to them or their company. To my mind, an act on the part of the respondent was an act of showing favour to his sister's husband or the brother-in-law to effect financial advantage to him.

In my judgment the learned President erred in law when he arrived at the decision he did. I have also in considering the appeal that is before me reviewed the totality of the evidence adduced by both the prosecution and the defence and have arrived at a finding that on the facts a verdict of not guilty would be grossly against the weight of evidence.

For the above reasons, I would allow the appeal, set aside the order of acquittal and substitute therefor a conviction.

In passing sentence I have taken into consideration the submission made by Mr. Balasundaram counsel for the respondent, in his plea for mitigation, that the respondent was arrested in 1976 and the charge has been hanging over his head for at least six years and also the fact that all this while the respondent has been interdicted from service.

It must however be observed that the respondent has committed a very serious offence. Perhaps it would also be appropriate to say that if there is a hope for the country to have a clean and efficient administration it is essential that members of the administration should not be corrupt. Offences for corrupt practice committed by a public officer, Members of Parliament and Assemblymen must therefore be dealt with severely. Public interest demands it.

In the case of the respondent I consider the fact that this case has dragged on for some years and that he has, undoubtedly, suffered quite a lot. Nonetheless it would be against public interest if he should be let off lightly I therefore consider it appropriate to impose imprisonment for 24 months.

Also found at [1982] CLJ 254